

to do so from the District Council. Whether there was any valid and implied condition precedent and what its effect would be on the sale agreement were I think triable issues amounting to a *bona fide* defence on the merits. The defendants had also only recently received an extension of the developers' licence under section 5 of the Housing Developers (Control and Licensing) Act 1966. This document which was produced at the hearing by Mr. Thara Singh Sidhu for the defendants was dated May 24, 1978 and it showed that the Controller of Housing had extended the licence to February 23, 1980.

The second issue raised by the defendants was that for reasons beyond their control the cost of building materials had escalated to such an extent as to make it unreasonable and impossible for the defendants to erect the house at the agreed price. The case of *Daiman* appears to go against this contention. However reading the judgment of the High Court and that of the Federal Court in *Daiman's* case it would appear that the decision on this point evolved on the construction and interpretation of the brief booking *pro forma* and of the relevant provisions of the Housing Developers (Control and Licensing) Rules 1970. The provisions in the agreement of sale in the present case are much more elaborate than the short and simple *pro forma* in *Daiman's* case. It will be necessary to consider and construe these provisions after trial in the light of the allegations made by the defendants that there was an implied condition precedent and that the terms of the contract had become unreasonable and impossible to perform because of the increase in the cost of building material. In this context the question of unreasonableness or otherwise or of any undue advantage or disadvantage which may accrue to one or the other party consequent upon the performance of the sale agreement is in my view a contention to be adjudged after trial. It may be noted here that *Daiman's* case was not determined summarily but only after a trial in the usual manner.

Now to revert to the application itself. In his supporting affidavit it was incumbent upon the plaintiff to verify the cause of action and state that in his belief there was no defence to the action. The defendants did not raise any preliminary objection to the plaintiff's affidavit but I myself did point out to Mr. Chua Jui Meng for the plaintiff that in the plaintiff's affidavits there appeared to be no verification of the cause of action nor a statement that there was no defence to the action. Mr. Chua Jui Meng said he was quite satisfied with the plaintiff's affidavits and submitted that they complied with Order 14A. I am afraid I cannot agree.

To enable the court or a judge to hear any application for summary judgment under Order 14 or Order 14A, in other words, to give the court or a judge jurisdiction to hear the application, three conditions must be satisfied in the supporting affidavit. First the affidavit must be made by the plaintiff or by any other person who can swear positively to the facts, secondly the deponent must verify the cause of action and thirdly he must state in the affidavit that in his belief there is no defence to the action. The clear provisions of Order 14 rule 1(a) and Order 14A rule

1(1) are mandatory and they must be complied with if a plaintiff wants to get judgment without any trial whatsoever. In the present case the plaintiff had complied with the first two conditions but not the third condition for he had failed to say on affidavit that in his belief there was no defence to the action. The plaintiff's application for summary judgment under Order 14A was therefore deficient for want of compliance with rule 1(1) of the Order and ought to have been dismissed *in limine*.

I dismissed the application. But as I had in fact heard the application and had formed the opinion that the defendants had disclosed sufficient facts entitling them to defend the action I gave them unconditional leave to defend.

Order accordingly.

Solicitors: Chua Bros.; M.S. Miranda & Co.

PUBLIC PROSECUTOR v. MOHAMED NOOR JANTAN

[A.Cr.J. (Wan Suleiman F.J.) December 15, 1978]
[Kuala Lumpur — Federal Territory Criminal Appeal
No. 41 of 1977]

Criminal Law and Procedure — Cautioned statement — Whether admissible in evidence even though not produced by prosecution as part of prosecution case — Internal Security Act, 1960, s. 75 — Corrosive and Explosive Substances and Offensive Ordinance, 1958, s. 6(1) — Supreme Court of Judicature Act, s. 66.

Evidence — Burden of proof on accused is "only a slight one".

The respondent in this case was charged for having in his "possession an offensive weapon, to wit a 'kerambit' knife otherwise than with lawful authority", an offence punishable under section 6(1) of the Corrosive and Explosive Substances and Offensive Weapons Ordinance 1958. At the trial before the Sessions Court, defence counsel produced a cautioned statement which the Investigating Officer had recorded from the respondent. The learned President acquitted the respondent without calling upon him to make his defence. In his Grounds of Judgment he referred to the said cautioned statement in which the accused/respondent had stated that he had bought the knife from a stadium. The learned President had obviously inferred that the accused had the weapon for a lawful purpose and there was no evidence of its use for an unlawful purpose.

The main ground of appeal was whether the said cautioned statement recorded in accordance with section 75 of the Internal Security Act 1960 was admissible in evidence where the prosecution for reasons of their own did not wish to produce it as part of the prosecution case.

Held, dismissing the appeal: (1) since the cautioned statement is substantive evidence defence is at liberty to ask for and secure its admission during the course of the prosecution case. It follows that if after considering the cautioned statement and such other evidence as the prosecution had already adduced, the court finds that there was *prima facie* no case to answer, the court could acquit the accused at that stage;

(2) where a burden is placed on an accused person to prove anything, by statute or common law, the burden is only a slight one and this burden can be discharged by evidence of witnesses for the prosecution as well as witnesses for the defence.

Cases referred to:-

- (1) *Re Abdul Latiff* [1960] M.L.J. 198.
- (2) *Wong Chooi v. Public Prosecutor* [1967] 2 M.L.J. 180.
- (3) *Law Tun Wah v. Public Prosecutor* [1978] 1 M.L.J. 167.

CRIMINAL APPEAL.

Mah Weng Kwai (Deputy Public Prosecutor) for the appellant.

R.R. Sethu for the respondent.

Wan Suleiman F.J.: When I dismissed the appeal I did not think that this matter called for any written grounds of judgment, but since the allowing of the Public Prosecutor's motion for issue of a certificate under section 66 of the Court of Judicature Act I now feel that it would only be proper to state why I dismissed this appeal.

The respondent was tried before the Sessions Court, Kuala Lumpur on the following charge:

"That you on June 25, 1974 at about 2.50 p.m. at No. 16, Hale Road, in the City of Kuala Lumpur, did have in your possession an offensive weapon, to wit a 'Kerambit' knife otherwise than with lawful authority, and that you have thereby committed an offence punishable under section 6(1) of the Corrosive and Explosive Substances and Offensive Weapons Ordinance No. 43/58."

It should be noted here that the words "or for a lawful purpose" which appears in section 6(1) of the Ordinance was omitted, though any charge under that subsection which left out these words would be defective. However, both the notes taken by the learned President and his grounds showed that neither defence counsel nor the learned President had failed to note the omission, and indeed the defence was that the possession of this offensive weapon was for a lawful purpose.

In the Sessions Court prosecution called two witnesses, the P.C. who made the arrest, and the Investigating Officer who was no doubt called to produce formally the Exhibits handed over to him.

Over the objection of the prosecuting officer who said that prosecution did not intend to tender the cautioned statement the Investigating Officer had recorded from respondent and that it could only be used to impeach the credit of respondent, an eventuality which had not arisen at that stage defence counsel was successful in persuading the court to order its production. Counsel had relied on the wording of section 75 of the Internal Security Act, 1960 under which the statement was recorded. Since the prosecution had never suggested that the respondent had *not* been properly cautioned or had *not* made the statement voluntarily, it was argued that the statement shall "be admissible at his trial in evidence".

The statement was duly marked Exhibit P3. I shall not comment on the appropriateness of it being given a marking which would suggest that it was a prosecution exhibit since the point was never raised during the appeal.

At the termination of the cross-examination of the Investigating Officer by defence counsel, prosecutor closed his case.

The learned President acquitted respondent without calling upon him to make his defence. In his Grounds of Judgment he referred to the cautioned statement P3 in which accused had stated that he had brought P1 from Changkat Stadium. It is clear from his judgment that he accepted defence counsel's submission that from this fact it could be inferred that

A he had the weapon for a lawful purpose and further that there was no evidence of its use for an unlawful purpose. It should be noted that the prosecuting officer did not challenge the correctness of this inference.

B The main ground of appeal is whether a cautioned statement such as the present one recorded in accordance with section 75 of the Internal Security Act, 1960 is admissible in evidence where the prosecution for reasons of their own does not wish to produce it as part of the prosecution case.

The relevant part of section 75 reads:

C "(1) Where any person is charged with any offence against this Act or against any written law for the time being specified in the Second Schedule any statement, whether such statement amounts to a confession or not... shall notwithstanding anything to the contrary contained in any written law, be admissible at his trial in evidence and, if such person tenders himself as a witness, any such statement may be used in impeaching his credit."

D It seems to me that there can be no doubt that once it is established (or as in this case not denied, indeed tacitly admitted) that the statement was (a) voluntary and (b) had been made after the proper words of caution had been administered, it becomes "admissible in evidence". It is in fact substantive evidence, and the words "and, if such person tenders himself... for the purpose of impeaching his credit." is superfluous, merely repeating an existing provision of the Evidence Act (section 145).

E In the normal course of things a prosecutor who anticipates that a cautioned statement would prove useful for just such a purpose would produce it during the course of the prosecution case, and wait for the accused person to testify so that he would have available a useful weapon with which to shake his credit. F Those words however do not restrict the admissibility to such purpose only, and since the statement is substantive evidence defence is at liberty to ask for and secure its admission during the course of the prosecution case. It follows that if after considering the cautioned statement and such other evidence as the prosecution had already adduced, the court finds that G there is *prima facie* no case to answer, the court should of course acquit the accused at this stage.

H Though section 6(2) of the Corrosive & Explosive Substances and Offensive Weapons Ordinance 1958 places the onus of a lawful purpose on the accused, as Adams J. said in *Re Abdul Latiff*⁽¹⁾ — the extent of proof needed to shift this onus is lighter than that which is placed on the prosecution to prove its case. Since the learned President drew the inference favourable to the accused — that his purchase of the kerambit openly at the Changkat Stadium showed that it was for a lawful purpose, I do not feel that it would be proper for me to draw some other inference even I had I been so inclined.

I It is a well settled rule of evidence as Azmi C.J. (Malaya) (as he then was) held in *Wong Chooi v. Public Prosecutor*⁽²⁾ that where a burden is placed on an accused person to prove anything, by statute or common law, the burden is only a slight one and this burden can be discharged by evidence of witnesses for the prosecution as well as witnesses for the defence.

In *Law Tun Wah v. Public Prosecutor*,⁽³⁾ the Federal Court held, no doubt *obiter* that even where the prosecution did not wish to produce a cautioned statement, which was like the present one, recorded under the Internal Security Act, 1960, defence could cause prosecution to produce if they consider that it would assist the accused.

I shall not touch upon other questions raised in the course of arguing the Motion for a certificate under section 66 of the Courts of Judicature Act, because these other questions were not argued at the appeal.

For the reasons given above, the appeal was dismissed.

Appeal dismissed.

Solicitors: *Chin & Sethu.*

SYARIKAT CHIP SENG TRADING SDN. BHD. & ANOR. v. PUBLIC PROSECUTOR

[A.Cr.J. (Suffian L.P.) December 19, 1978]

[Kuala Lumpur — Federal Territory Criminal Trial Appeal
Nos. 70 & 71 of 1977]

Trade Descriptions — False trade descriptions on school exercise books — Appeal against conviction — Trade Descriptions Act, 1972, ss. 3(1)(a), 4(1)(a), 4(3) & 5(1) to (3) — Evidence Act, 1950, s. 33.

There are two appeals in this case. In appeal No. 70, a company, Syarikat Chip Seng Trading Sdn. Bhd. was convicted; and in Appeal No. 71, its manager. They were convicted of applying false trade descriptions to school exercise books, (the number of pages indicated on the cover of the book did not represent the actual and correct number of pages of the book) in the course of a trade or business. They appealed. The issue before the court is whether the learned magistrate was right in finding that the accused had in the course of a trade or business applied false trade descriptions to the exercise books.

Held: the learned magistrate was right in finding that the man in the street would conclude that the figures on the outside covers of these books were likely to be taken for an indication of their pages and that they were misleading.

CRIMINAL APPEALS.

Jagjit Singh for both appellants.

M. Yassin bin Ibrahim (Deputy Public Prosecutor)
for the respondent.

Cur. Adv. Vult.

Suffian L.P.: These two appeals were heard together by me sitting in the High Court.

In Appeal No. 70 a company, Syarikat Chip Seng Trading Sendirian Berhad ("the company"), was convicted; and in Appeal No. 71, its manager. They were convicted of applying false trade descriptions to school exercise books in the course of a trade or business.

The charge against the company reads as follows:

"That you on February 23, 1973 at about 11.30 a.m. at premises Lot No. 14, Light Industrial Area, 4½ mile, Klang Gate Road, Kuala Lumpur in the District of Kuala Lumpur in the State of Selangor in the course of a business, did apply a false trade description to the following goods: to wit the number of pages indicated on the cover of the book does not represent the actual and correct number of pages of the book:—

- | | | |
|---|---|--------------|
| A | (1) Exercise Books Horse Brand marked '40' on the cover when the actual pages being 24 - - - - - | 10,200 books |
| | (2) Exercise Books Horse Brand marked '80' on the cover when the actual pages being 60 - - - - - | 6,800 books |
| | (3) Exercise Books Silver Cup Brand marked '120' on the cover when the actual pages being 100 - - - - - | 3,000 books |

B and that you have thereby committed an offence under section 3(1)(a) of the Trade Descriptions Act, 1972, and punishable under section 18 of the same Act."

The charge against the manager reads more or less the same, except that here the charge alleges that the accused was manager of the company.

C The case for the prosecution which the learned magistrate accepted was this. The company was in the business of selling the exercise books, the subject of the charges, and the appellant in the second appeal was its sales manager. There were three types of exercise books: one with the figure '40' printed on it; another with the figure '80' printed on it; and the third with the figure '100' printed on it, each of these figures being printed on the front cover. These figures denoted the number of pages contained in each of the books and they did not tally. The type printed with the figure '40' had only 24 pages, the type printed with the figure '80' had only 60 pages and the type printed with the figure '120' had only 100 pages. Thus, the accused had in the course of a trade or business applied false trade descriptions to the books, contrary to section 3(1)(a) of the Trade Descriptions Act, Act 87.

The question here is whether the learned magistrate was right in finding that the accused had in the course of a trade or business applied false trade descriptions to the exercise books.

The two accused were convicted in a retrial. They had previously been convicted before another Magistrate on March 4, 1974. They appealed and a retrial was ordered. At the first trial the principal witness was Encik Ismail Johan, Assistant Controller, Trade Description, Ministry of Trade and Industry, who on February 23, 1973, led a party to raid the premises of the company at the 4½ mile, Klang Gate Road, Kuala Lumpur. At the retrial he was not called, as he had since died, and the principal witness for the prosecution was Encik Mohammed Kassim bin Haji Zainal of the Enforcement Division of the Ministry, and he was called as the second witness and accordingly numbered PW2, the first (PW1) being Encik Radha (a clerk in the Magistrate's Court) who produced the charge sheets and the notes of the evidence taken at the first trial. In his grounds, the learned magistrate who conducted the retrial referred to the deceased Encik Ismail Johan as PW1, and it was argued that the learned magistrate was in error. I agree he was wrong in so numbering Encik Ismail, but, with respect, I do not think that this made much difference. First, under section 33 of the Evidence Act the learned magistrate was entitled to rely on the evidence given by the deceased in the first trial "for the purpose of proving the truth of the facts which it states". Mr. Jagjit Singh drew my attention to the fact that after the deceased had given evidence